Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Consumer and Governmental Affairs Bureau	)	CG Docket No. 18-152
Seeks Comment on Interpretation of the	)	
Telephone Consumer Protection Act in Light	)	
of D.C. Circuit's ACA International Decision	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	

REPLY COMMENTS OF TRANZACT

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SUMMARY

MG LLC d/b/a TRANZACT, through its insurance agency subsidiaries, TZ Insurance Solutions LLC and TruBridge, Inc. (together, "TRANZACT"), provides the premier marketplace for the distribution of direct-to-consumer insurance products, including Medicare insurance plans. TRANZACT helps consumers to locate, compare and purchase life and health insurance policies that are best suited to their individual needs and budget. Contacts by phone between a TRANZACT licensed and trained insurance agent and a consumer are the most reliable and efficient way to provide consumers with answers to the questions they have, and to provide information that they want and need, but quite often is not readily available.

Unfortunately, however, consumer outreach by companies like TRANZACT has come under fire in recent years, caused primarily by the explosion of class action lawsuits alleging purported violations of the TCPA, and fueled by the FCC's nebulous and often expansive interpretations of the statute. In particular, the Commission's prior statements and orders regarding the TCPA have made it impossible for businesses like TRANZACT to know whether the equipment they are using to place calls to consumers constitutes an automatic telephone dialing system ("ATDS"), and therefore to know what obligations apply to a call. Given this cloud of uncertainty, TRANZACT has been forced to forego certain types of legitimate communications designed to reach consumers and provide desired information about their health insurance options.

The TCPA has evolved to the point where virtually any call made to a consumer potentially violates the TCPA, rather than only those calls initiated in a certain, specific manner that Congress sought to regulate by enacting the TCPA. There is no reasonable way for a well-meaning company to determine or know, with any real certainty, whether or not the equipment it is using meets the definition of ATDS, unless and until it has been sued and a decision on the

merits of the question of whether it used an ATDS is reached. Opportunistic attorneys have seized on this ***uncertainty*** to extract multi-million dollar settlements from law-abiding companies, thereby creating a chilling effect on companies (like TRANZACT) that don't want to suffer the same fate and that simply want to comply with the law.

Accordingly, as discussed further herein, TRANZACT urges the Commission to adopt a clearer, narrower definition of ATDS that closely adheres to the language and purpose of the TCPA. Additionally, the Commission should clarify what activities by a caller constitute "manual" dialing such that its calls would not be subject to the TCPA. These actions will better enable businesses to ensure that they comply with the TCPA. More importantly, additional certainty will enable consumers to receive the information that they want and need, from entities from which they have requested information, about topics that are of critical importance to them. Finally, the Commission should implement a reasonable interpretation of "called party," as well as establish specific means by which a consumer may revoke consent which are *per se* reasonable.

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REPLY COMMENTS OF TRANZACT

MG LLC d/b/a TRANZACT, by its attorneys, hereby submits these reply comments to the Federal Communications Commission ("Commission" or "FCC") in response to the Public Notice seeking comment on the interpretation and implementation of the Telephone Consumer Protection Act ("TCPA") following the recent decision of the U.S. Court of Appeals for the District of Columbia Circuit in *ACA International v. FCC*.[1]

TRANZACT, through its insurance agency subsidiaries, TZ Insurance Solutions LLC and TruBridge, Inc. (together, "TRANZACT"), provides the premier marketplace for the distribution of direct-to-consumer insurance products, including Medicare insurance plans. TRANZACT helps consumers to locate, compare and purchase life and health insurance policies that are best suited to their individual needs and budget. In order to provide these individually-

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[1] *See Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of D.C. Circuit's ACA International Decision*, CG Docket No. 18-152 et al., Public Notice, DA 18-493 (rel. May 14, 2018) ("TCPA Public Notice"). *See also ACA Int'l. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). The TCPA Public Notice also seeks comment on a recent petition for declaratory ruling filed by the U.S. Chamber Institute for Legal Reform and 17 co-petitioners. *See* U.S. Chamber Institute for Legal Reform et al., Petition for Declaratory Ruling, CG Docket No. 02-278 (filed May 3, 2018) ("U.S. Chamber Petition").

tailored products and services, TRANZACT relies heavily on meaningful, hands-on communications with consumers, primarily via telephone contact. Through these communications, TRANZACT's licensed insurance agents are able to provide consumers with much-needed assistance to navigate through the insurance enrollment process, including helping consumers to answer a series of lengthy and often complex questions to help find an insurance plan or plans that will best meet the consumers' needs. These contacts are initiated both by consumers who call TRANZACT directly (perhaps in response to TV commercials), as well as outbound calls to consumers who have expressed an interest in learning more about the insurance options available through TRANZACT (e.g., filling out a form on a website, returning a mailer).[2]

Such communications are both beneficial and desirable to most consumers. Indeed, consumers want and need health insurance products. They reach TRANZACT because insurance can be confusing. Contacts by phone between a TRANZACT licensed and trained insurance agent and a consumer are the most reliable and efficient way to provide consumers with answers to the questions they have, and to provide information that quite often is not readily available. Unfortunately, however, consumer outreach by companies like TRANZACT has come under fire in recent years, caused primarily by the explosion of class action lawsuits alleging purported violations of the TCPA, and fueled by the FCC's nebulous and often expansive interpretations of the statute. In particular, the Commission's prior statements and orders regarding the TCPA have made it impossible for businesses like TRANZACT to know whether the equipment they are using to place calls to consumers constitutes an automatic telephone dialing system ("ATDS"), and therefore to know what obligations apply to a call.

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[2] TRANZACT does not engage in any form of "cold-calling" to consumers.

Given this cloud of uncertainty, TRANZACT has been forced to forego certain types of legitimate communications designed to reach consumers and provide desired information about their health insurance options.

The TCPA has evolved to the point where virtually any call made to a consumer potentially violates the TCPA, rather than only those calls initiated in a certain, specific manner that Congress sought to regulate by enacting the TCPA. Certainly, if Congress had intended to regulate every call placed to a consumer, then it would have had no reason to specify that the statute covered only those calls made using a certain type of equipment. Nevertheless, under the Commission's interpretations of ATDS, this is the outcome being rendered – every call placed on equipment that was manufactured in this century now potentially falls within the reach of the TCPA. And, there is no reasonable way for a well-meaning company to determine or know, with any real certainty, whether or not the equipment it is using meets the definition of ATDS, unless and until it has been sued and a decision on the merits of the question of whether it used an ATDS is reached. Opportunistic attorneys have seized on this ***uncertainty*** to extract multi-million dollar settlements from law-abiding companies, thereby creating a chilling effect on companies (like TRANZACT) that don't want to suffer the same fate and that simply want to comply with the law.

The Commission's interpretations are hurting consumers and the businesses that are trying to serve them. Accordingly, as discussed further herein, TRANZACT urges the Commission to heed the calls of initial commenters in this proceeding to provide much-needed clarity on various provisions of the TCPA, particularly with respect to the definition of an ATDS. Specifically, the Commission should adopt a clearer, narrower definition of ATDS that closely adheres to the language and purpose of the TCPA. Such a definition would allow

businesses – and the courts – to reasonably determine whether a particular piece of equipment falls within the scope of the statute and to make a deliberate choice whether to use that equipment to dial consumers. Additionally, the Commission should clarify what activities by a caller constitute "manual" dialing such that its calls would not be subject to the TCPA. These actions will better enable businesses to ensure that they comply with the TCPA. More importantly, additional certainty will enable consumers to receive the information that they want and need, from entities from which they have requested information, about topics that are of critical importance to them.

Finally, TRANZACT supports those commenters that have asked the Commission for greater certainty in other areas implicating the TCPA. The Commission should implement a reasonable interpretation of "called party," as well as establish specific means by which a consumer may revoke consent which are *per se* reasonable.

I. A CAREFULLY TAILORED DEFINITION OF ATDS IS NECESSARY TO PROVIDE CLARITY AND TO ENABLE MEANINGFUL COMMUNICATIONS TO CONSUMERS

In response to the Commission's request for feedback on what "functions" and "capacity" a device should have in order to be deemed an ATDS,[3] numerous commenters urged the Commission to adopt a narrowly tailored definition, consistent with the language and objectives of the statute, that would reasonably allow businesses to determine whether or not they were making calls using ATDS devices or equipment. TRANZACT supports these commenters, as well as calls from commenters for the FCC to clarify what functions and

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[3] TCPA Public Notice at 2.

activities do not amount to "automatic" dialing and how callers can avoid violating the TCPA by avoiding use of equipment that Congress was concerned with regulating.

A. The Commission Should Adopt a Common-Sense Interpretation of the Term "ATDS" in Accordance With the Plain Language of the TCPA

On the question of "what constitutes an [ATDS],"[4] TRANZACT supports the view offered by numerous commenters that equipment is not an ATDS unless it satisfies "two bright-line requirements: (1) that equipment use a random or sequential number generator to store or to produce numbers; and (2) that the equipment dial those numbers without human intervention."[5] Such an approach "will bring much-needed clarity to the TCPA"[6] for businesses and organizations, including TRANZACT, that "rel[y] heavily on [the] ability to transact business by telephone."[7]

As Quicken Loans observed in its comments, "[t]he blurry autodialer definition [present today] makes it nearly impossible for businesses to know if they are compliant when calling customers."[8] The result, as the Cypress Group explained, is that "the TCPA has

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4 TCPA Public Notice at 1.

5 Comments of the Retail Industry Leaders Association, CG Docket Nos. 18-152, 02-278, 15 (filed June 13, 2018) ("RILA Comments"). *See also* U.S. Chamber Petition at 21; Comments of the Bureau of Consumer Financial Protection, CG Docket Nos. 18-152, 02-278, 2 (filed June 13, 2018) ("a properly circumscribed definition of that term could be critical to fostering communications between consumers and debt collectors, services, and other financial service providers").

6 RILA Comments at 15.

7 Comments of Quicken Loans, CG Docket Nos. 18-152, 02-278, 1 (filed June 13, 2018) ("Quicken Loans Comments").

8 Quicken Loans Comments at 2. *See also* Comments of the Coalition of Higher Education Assistance Organizations in response to "Interpretation Of The Telephone Consumer Protection Act In Light Of The D.C. Circuit's ACA International Decision," CG Docket Nos. 18-152, 02-278, 3 (filed June 13, 2018) ("current regulations have made it

inadvertently hindered many insurance companies from conducting consumer-friendly telemarketing – and even non-telemarketing – communications."[9]

> This regulatory uncertainty has also stifled innovation.[10] For example,
>
> > Instead of designing the most efficient and accurate dialing systems that advanced technology would support, manufacturers and users introduced deliberate inefficiencies that served no other purpose than to reduce the users' exposure to TCPA class-action lawsuits. Those inefficiencies include the obvious, such as having live agents press ten digits individually for each call (with the inevitable dialing errors, including unintended calls to the very public-safety and emergency numbers Congress intended to protect); or having agents retrieve numbers individually from a database, display them on a monitor and manually click a dialing command for each call. … The callers incur needless costs that inevitably are passed on to consumers.[11]

The Commission can and should correct this problem by adopting "a clear and precise definition of ATDS [that] will enable good actors to comply."[12] As RingCentral noted, "[e]ncouraging

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extremely difficult for legitimate businesses to contact consumers for legitimate purposes to communicate important information.").

9 *See* Letter from Bridget Hagan, Executive Director, The Insurance Coalition, to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 18-152, 02-278, 1 (filed June 13, 2018) ("Cypress Group Comments").

10 *See* Comments of RingCentral, Inc., CG Docket Nos. 18-152, 02-278, 5 (filed June 13, 2018) ("RingCentral Comments") ("A constantly shifting definition of ATDS has left the industry without clear guidance as to which technologies qualify, which stifles innovation.").

11 Comments of TechFreedom at 5-6. *See also* RingCentral Comments at 6 ("If there is uncertainty about whether a particular dialing technology could be viewed by a court as an ATDS, callers – and the companies that are developing new dialing technology – concerned about the high cost of TCPA litigation may be deterred from investing in it. That leaves businesses with fewer choices and less competition. This ambiguity hurts individuals and consumers by making it harder for companies to take advantage of technological innovation that permits callers to more carefully target calls and avoid unwelcome communications.").

12 *See* RingCentral Comments at 6.

industry to innovate with new technologies may protect consumers by helping businesses carefully target only those customers who want to be contacted about a particular product or service," but "a badly defined ATDS creates enormous legal risks for companies seeking to use these innovative technologies to better serve customers and potential customers."[13]

For TRANZACT and its customers, a clear definition of an ATDS will facilitate communications regarding Medicare solutions and other insurance available to them. With a definition of an ATDS that follows the statutory command, TRANZACT will be able to implement advanced call management software and confidently employ speed dialers to avoid mis-dialed calls, knowing what obligations it must comply with in the process. Further, no longer would TRANZACT have to worry about whether it had jumped through the precise "prior express written consent" hoops before reaching out to a customer in need. For example, TRANZACT would be free to return a customer-initiated communication if the call is disconnected, or the customer runs out of time to talk, or a customer question requires follow-up. Instead, TRANZACT can focus on what really matters: providing customers with the most accurate, tailored information to enable them to select the right health insurance plans available to them.

A narrow, statutorily-based interpretation of ATDS also will best serve the intended purpose of the TCPA. As the Retail Industry Leaders Association observed, "the congressional findings make clear [that] random or sequential autodialers created unique risks" and the TCPA was intended to address those specific risks.[14] The D.C. Circuit acknowledged

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13 RingCentral Comments at 4.

14 RILA Comments at 9 ("Specifically, Congress found that random or sequential dialers, by reaching numbers indiscriminately, would tie up lines reserved for specialized purposes, including hospitals and police and fire departments. In addition, sequential

this limitation when it struck down the Commission's 2015 interpretation of ATDS, finding that it would have "extend[ed] a law originally aimed to deal with hundreds of thousands of telemarketers into one constraining hundreds of millions of everyday callers."[15]

Some commenters, by contrast, would have the Commission essentially reinstate the 2015 definition of ATDS, but with only a "clear carve-out for the ordinary use of a smartphone."[16] This approach is not responsive to the court, and does not overcome the harm the FCC's ambiguous definitions have caused. Moreover, the premise that the FCC must adopt "flexible" definitions or combat "evasion" of the TCPA by addressing newer devices is flawed. As the court noted, "Congress need not be presumed to have intended the term [ATDS] to maintain its applicability to modern phone equipment in perpetuity, regardless of technological advances that may render the term increasingly inapplicable over time."[17] Congress addressed equipment with two significant harms – the ability to store or produce numbers using a random or sequential number generator. The FCC should not guess as to what other equipment Congress might now find objectionable.

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dialing functionality, if employed *en masse*, could create a 'dangerous' situation wherein whole blocks of numbers were called at once, leaving no lines available for outbound calls in the event of an emergency, and limiting the provision of service to numbers within particular blocks."). *See also* Comments of TechFreedom, CG Docket Nos. 18-152, 02-278, 3 (filed June 13, 2018) ("TechFreedom Comments") ("When lists of numbers generated randomly or in sequence are coupled with automatic dialing devices that rapidly initiate high volumes of calls, the result is the very harms that Congress rightly identified as a threat to public safety communications.").

15 885 F.3d at 698-99.

16 *See* Comments of National Consumer Law Center et al., CG Docket Nos. 18-152, 02-278, ii (filed June 13, 2018).

17 885 F.3d at 698-99.

Indeed, "[b]y not opting for any such broader definition, Congress left open the way for better technologies that would correct the problems posed by reliance on random or sequential number generation. In this way, the TCPA encouraged innovation and marketplace dynamism."[18] Thus, "rather than transform the statute 'into an unpredictable shotgun blast covering virtually all communications devices,' [the Commission should] 'respect the precise contours of the statute that Congress enacted.'"[19]

B. The Commission Should Clarify What Activities Constitute Manual Dialing that Would Not Be Subject to the TCPA

Several commenters also urged the Commission to provide guidance on whether and how "human intervention" would affect whether a device should be classified as an ATDS. The D.C. Circuit observed in *ACA International* that despite the fact that the language of the TCPA "would seem to envision non-manual dialing of telephone numbers," under the FCC's interpretation, "a device might still qualify as an autodialer even if it cannot dial numbers without human intervention," and "[t]hose side-by-side propositions are difficult to square."[20] TRANZACT agrees with the court and the commenters that have asked the FCC to address this apparent contradiction. Indeed, RingCentral was correct that "[t]he industry needs clarity on the definition of 'automatic' [and] [t]hat definition should comport with the commonsense, dictionary definition of 'automatic': without human intervention."[21] More specifically, TRANZACT supports UnitedHealth Group's request for "the FCC to clarify that an individual

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18 TechFreedom Comments at 3.

19 RILA Comments at 11 (internal citations omitted).

20 885 F.3d at 703.

21 RingCentral Comments at 5.

manually dialing a telephone number, including an individual clicking on a phone number on a computer (sometimes referred to as 'click-to-call' technology), is not considered making a call made using an ATDS."[22] Because "[s]uch methods of dialing do not allow for the contacting of thousands of people in a short period of time and also do not require the use of a random or sequential number generator to create or store the numbers to be dialed," this clarification would be consistent with the Commission's prior acknowledgements of the limitations of the TCPA.[23]

TRANZACT also respectfully submits that the Commission should similarly clarify that the ATDS restrictions do not apply to outbound calls that are made for the purpose of returning a call that was initiated by a consumer (e.g., calling a consumer back if the call was cut off, if the consumer asked to be placed on a wait-list or return call queue, or the customer specifically requested to be called back at another time). In each of these instances, the caller is not automatically or randomly generating numbers to be called, and the calls should not fall within the scope of the TCPA.

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22 *See* Letter from Thad C. Johnson, Chief Legal Officer, UnitedHealthCare, and Richard J. Mattera, Chief Legal Officer, Optum, to Marlene H. Dortch, Secretary, FCC, CG Docket Nos. 18-152, 02-278, 2 (filed June 13, 2018) ("UnitedHealth Group Comments").

23 As then-Commissioner Pai noted in his dissent to the 2015 TCPA Order, the Commission historically had acknowledged the limitations of the statute, including by finding that "the prohibitions on using automatic telephone dialing systems "clearly do not apply to functions like 'speed dialing,' 'call forwarding,' or public telephone delayed message services because the numbers called *are not generated in a random or sequential fashion*." *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, CG Docket No. 02-278 et al., Declaratory Ruling and Order, 30 FCC Rcd. 7961, Dissenting Statement of Commissioner Ajit Pai (rel. July 10, 2015) ("2015 TCPA Order") (citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8776, para. 47 (1992)). *See also* Comment of DialAmerica Marketing, Inc., CG Docket Nos. 18-152, 02-278, 4 (June 13, 2018) ("DialAmerica Comments").

II. THE COMMISSION SHOULD ADOPT RULES TO ADDRESS MIS-DIALED CALLS AND REVOCATION OF CONSENT THAT PROVIDE CLEAR, PRACTICAL GUIDANCE TO BUSINESSES

In addition to the above-described clarifications regarding the basic definition of an ATDS, TRANZACT agrees with commenters that the Commission should take swift action to address two other central TCPA issues. First, the Commission should clarify that "called party" under the TCPA refers to the intended recipient of a call, or, alternatively, that a business may reasonably rely on the validity of consent until it has actual notice that the intended recipient is not the actual recipient of the call. Numerous parties advocated for this interpretation in their initial comments in this proceeding,[24] and TRANZACT agrees with this approach. Second, the Commission should delineate specific *per se* reasonable methods by which a consumer could revoke his or her consent to be contacted. Businesses need clear rules in this area in order to develop consistent, reliable processes that their employees and agents can implement.

In particular, TRANZACT supports the Retail Industry Leaders Association's position that "callers be permitted to designate one or more clearly defined and easy-to-use opt-out methods … and that opt-out requests submitted via the method(s) designated by the caller be deemed presumptively reasonable. … [O]pt-out requests submitted via a method other than those that are clearly defined, easy to use, and designated by the caller be deemed presumptively unreasonable."[25] This approach would provide much-needed clarity for businesses that, despite good faith attempts to comply with the TCPA, have found themselves entangled in litigation

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[24] *See, e.g.*, Quicken Loans Comments at 3; DialAmerica Comments at 8; RILA Comments at 21-23.

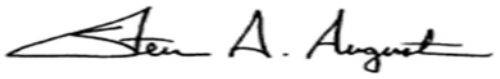
[25] RILA Comments at 29.

related to an opt-out request.[26] Moreover, it is consistent with the D.C. Circuit's conclusion that although consumers should be permitted to revoke consent by any reasonable means, "any effort to sidestep the available methods [of revocation] in favor of idiosyncratic or imaginative revocation requests might well be seen as unreasonable."

CONCLUSION

TRANZACT respectfully requests that the Commission take these comments into consideration and expeditiously issue an order clarifying the issues discussed herein.

Respectfully submitted,



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[26] *See, e.g.*, RILA Comments at 24-29 (explaining that consumers may, intentionally or unintentionally, attempt to revoke consent using methods other than the reasonable options delineated by the caller); *see also* Cypress Group Comments at 3-4 ("Too often, well-meaning companies are unable to honor requests for revocation, because they are not aware that such a request was made. This often occurs because the customer uses what they believe is a reasonable means to revoke consent, unaware that such revocation failed to reach the intended recipient.").